

General Information Letter: The Department cannot rule that a taxpayer has no nexus with Illinois.

March 20, 2000

Dear:

This is in response to your letter dated February 15, 2000 in which you state the following:

We are a California corporation and are usually not subject to the taxes or fees you have indicated. xxx is not "doing business" as defined in the Public Law 86-272 in your locale. We have traveling salespeople who may solicit orders from schools in your area, but they do not maintain an inventory, approve sales, handle returns or replacements, receive payments or pursue collections. All orders are approved, processed and shipped from our headquarters in xxxxxxxx, California. Consequently, xxx has not established nexus with your locale. Our sole "place of business" for tax purposes is in xxxxxxxx, California.

As a service to our customer organizations we maintain sales tax registration in all states which we operate. We do not report our sales to the school/resellers on our sales tax return, but we do report subsequent resale's of our products and have them collect the tax and remit it to us; we in turn remit it to your state. We do this solely as a service to our customer schools, because many are unable to provide a valid resale certificate and they may be incurring a sales tax liability on their fund raising sales of our products. This reporting on the schools behalf is why the DOR has identified IFS as doing business within the corporate limits of your city.

Because we do not have sufficient activities in your jurisdiction to be considered "doing business" and because our activities there do not establish nexus, we are not required to file the returns or pay the taxes or fees that you have requested.

According to the Department of Revenue ("Department") regulations, the Department may issue only two types of letter rulings: Private Letter Rulings ("PLR") and General Information Letters ("GIL"). The regulations explaining these two types of rulings issued by the Department can be found in 2 Ill.Adm.Code §1200, or on the website <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

Due to the nature of your inquiry and the information presented in your letter, we are required to respond with a GIL. GILs are designed to provide background information on specific topics. GILs, however, are not binding on the Department.

Section 201 of the Illinois Income Tax Act ("IITA"), 35 ILCS 5/101 et seq, imposes a tax measured by net income on corporations for the privilege of earning or receiving income in this State. The Due Process and Commerce Clauses of the Federal Constitution limit the power of States to subject foreign corporations to tax. The Due Process Clause requires that there exist some minimum connection between a state and the person, property, or transaction it seeks to tax (Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992)). Similarly, the

Commerce Clause requires that the tax be applied to an activity with a substantial nexus with the taxing state. Id.

Unless protected by Public Law 86-272, a foreign corporation has the requisite nexus to subject it to Illinois income tax where any part of its income is allocable to Illinois in accordance with the provisions of Article 3 of the Illinois Income Tax Act (35 ILCS 5/301-304, 308). Public Law 86-272 is a federal statute that prohibits a state's taxation of interstate sales of tangible personal property.

Your letter indicates that you "have traveling salespeople who may solicit orders from schools" in our area. Although you mention selling "products" in the state of Illinois, we cannot ascertain whether you are only selling tangible personal property. If yes, you would be correct as being protected under Public Law 86-272. However, if your corporation is not in the business of selling tangible personal property, your company is not protected by Public Law 86-272.

The fact that you have "traveling salespeople who may solicit orders from schools" in our area may give raise to the requisite nexus to subject your corporation to Illinois Income tax. Occasional visits to the state would probably satisfy the commerce and due process clauses. For example, in the New York case of Orvis v. Tax Appeals Tribunal, 86 N.Y.2d 165, 654 N.E.2d 954 (1995), the court found that four visits to nineteen customers in one year was enough to allow the state to tax a Vermont wholesaler.

If a corporation does establish nexus, business income will be apportioned to Illinois under Section 304 of the IITA. Illinois has used the 3-factor apportionment formula that takes into consideration the (1) payroll, (2) property and (3) sales of a corporation. Beginning with taxable years ending December 31, 2000, only sales will be used. This change to a "single-sales factor" will be phased in over a two-year period. Since you have no payroll or property within Illinois, the change does not effect your corporation. Should you have "nexus" with Illinois, you would use the amount of money that is retrieved from Illinois compared to the amount retrieved from all other states.

The question of nexus is highly fact-dependent. Therefore, the Department does not issue rulings regarding whether a taxpayer has nexus with the State. Such a determination can only be made in the context of an audit where a Department auditor has access to all relevant facts and circumstances. For that reason, we are referring your correspondence along with a copy of this letter to the Audit Technical Support Services Division.

As stated above, this is a general information letter which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department. If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of 2 Ill.Adm.Code §1200.110(b).

Sincerely,

Heidi S. Scott  
Staff Attorney - Income Tax